

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 162
5447943

BETWEEN

YONG ZHANG
Applicant

AND

FUCHUNJIANG LIMITED
T/A FUCHUNJIANG
RESTAURANT
Respondent

Member of Authority: Robin Arthur

Representatives: May Moncur, Advocate for the Applicant
Zhicong Hang, Director of the Respondent

Investigation Meeting: 23 April 2014

Determination: 29 April 2014

DETERMINATION OF THE AUTHORITY

- A. Yong Zhang was unjustifiably dismissed by Fuchunjiang Limited.**
- B. In settlement of Mr Zhang's personal grievance, and within 28 days of the date of this determination, Fuchunjiang Limited must pay him the following amounts:**
- (i) \$1800 in lost wages**
 - (ii) \$3000 as compensation for humiliation, loss of dignity and injury to feelings.**
- C. Under s131 of the Employment Relations Act 2000, and within 28 days of the date of this determination, Fuchunjiang Limited must also pay Mr Zhang the following sums as wage arrears:**
- (i) \$6600 as wages for the period from 24 April to 8 July 2013 (due under the terms of his employment agreement);**
 - and**

- (ii) **\$1284.48 as wages for the period from 9 July to 9 August 2013 (due under s6 and s11 of the Minimum Wage Act 1983); and**
- (iii) **\$844.80 as holiday pay on earnings for the period from 24 April to 9 August 2013 (due under s23(2) of the Holidays Act 2003).**

D. Within 28 days of the date of this determination Fuchunjiang Limited must also pay Mr Zhang the further sum of \$3000 for his costs of representation in the Authority investigation and reimburse him \$71.56 for the Authority filing fee.

Employment relationship problem

[1] Yong Zhang sought a finding that he was unjustifiably dismissed by his former employer, Fuchunjiang Limited, and orders that the company should pay him lost wages, distress compensation, wage arrears and his costs of representation.

[2] Mr Zhang worked as a Chinese chef at a restaurant run by the company in Botany. The company recruited him through an agent in Shanghai. In a statement in reply lodged by its director Zhicong Hang, the company denied Mr Zhang's claims were valid. It said Mr Zhang was given notice of the termination of his contract "*due to misconduct and misrepresentation*" and was owed no wages or holiday pay.

[3] Mr Zhang had arrived in New Zealand on 23 April 2013 with a work visa to work for up to two years as a chef for the company. He was told he could not start work straight away because repairs of damage to the restaurant, caused by a fire ten months earlier, were not yet completed. He was not paid for the period from 24 April to 8 July but was paid from 9 July when he and other kitchen staff began setup work for reopening of the restaurant on 12 July 2013. There was a dispute in the evidence of Mr Zhang and Mr Hang as to whether Mr Zhang was told of his dismissal on 21 or 31 July but they both agreed his last day of work was 9 August 2013.

The Authority's investigation

[4] Evidence considered for this determination included a written witness statement from Mr Zhang, a statement from Mr Hang attached to the company's statement in reply, and the answers given by Mr Zhang and Mr Hang to questions asked during the Authority's investigation meeting. Mr Zhang's answers were given in Mandarin and interpreted by an interpreter retained by the Authority. I also took account of closing submissions made by Mr Zhang's representative and Mr Hang.

[5] The company had not initially responded to Mr Zhang's application to the Authority because, according to Mr Hang, copies served at its registered office (its accountant's office) were not forwarded to him and the company's registered address for service was a residence at which Mr Hang no longer lived. It lodged a statement in reply after the Authority delivered further copies of the statement of problem to the restaurant premises.

[6] During the Authority investigation meeting Mr Hang provided a number of additional documents that he had not lodged with the company's statement in reply one month earlier. Those documents included a letter dated 19 July 2013 calling Mr Zhang to a disciplinary meeting (that Mr Zhang, in his evidence denied receiving) and a letter of termination dated 21 July 2013 (that Mr Zhang also denied seeing before and which Mr Hang, in his evidence, said Mr Zhang had refused to accept on 21 July). I declined a request from Mr Hang, made partway through the investigation meeting, that I also hear evidence from his New Zealand immigration agent David Kim. I considered the matters on which Mr Hang said Mr Kim could give evidence were either not relevant or not before the Authority for determination. These included whether Mr Hang had promised to pay Mr Zhang \$200 a week while he waited for the restaurant to reopen (which was irrelevant as the matter of payment for that period was resolved by a term of the employment agreement, considered below) and whether Mr Hang received any money from a payment equivalent to NZ\$20,000 that Mr Zhang said he made to an agent in China. Such a payment was outside the Authority's jurisdiction, being a payment allegedly made in China and with no evidence corroborating either that it had been made or, if so, that any portion of it was transferred to anyone in New Zealand.

[7] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not set out all evidence and submissions received. Findings of fact and law are stated and conclusions expressed on the issues for resolution.

[8] Those issues were:

- (i) Whether the company's actions met the test of justification under s103A of the Act, that is whether terminating Mr Zhang's employment was what a fair and reasonable employer could have done in all the circumstances at the time; and
- (ii) if not, what remedies were due to Mr Zhang, considering lost wages (subject to evidence of reasonable endeavours to mitigate his losses) and compensation for hurt and humiliation (again subject to evidence); and
- (iii) whether any remedies awarded should be reduced due to any blameworthy conduct by Mr Zhang contributing to the situation that gave rise to his grievance; and
- (iv) whether Mr Zhang was paid in accordance with the terms of his employment agreement (including whether he was entitled to be paid from 23 April when he arrived in New Zealand to start work and, whether once he was allowed to start work on 9 July, he should have been paid for all the hours he worked); and
- (v) whether the company owed holiday pay to Mr Zhang; and
- (vi) whether either party should contribute to costs of representation of the other party?

Was the termination of Mr Zhang's employment justified?

[9] There was a strong conflict in the evidence between Mr Zhang and Mr Hang on what had happened before and at the time that Mr Hang told Mr Zhang that his employment at the restaurant was to end.

[10] Mr Zhang said this occurred on 31 July, without any prior warning, while he was working in the kitchen. He said Mr Hang took him into the storeroom and told him he had to find another job and to leave work by 9 August.

[11] Mr Hang said he gave Mr Zhang written notice on 19 July of a disciplinary meeting about poor performance and then met with him on 21 July. Mr Hang said

they stood outside the front of the restaurant and he gave Mr Zhang an opportunity to explain himself. Mr Hang said Mr Zhang could not adequately explain why, on 19 July, he had not cut enough pork and beef slices for that day's service requirements (and had to hurriedly defrost more meat for slicing) or why on the same day, he had cut slices of beef shank rather than the lamb required for particular dishes. The 21 July letter also contained an allegation Mr Zhang had not followed instructions during the dinner rush on 18 July, but Mr Hang provided no evidence on the basis for that allegation. Mr Hang said from what he saw and what Mr Zhang told him, Mr Zhang did not have sufficient experience as a Chinese chef. Mr Zhang was dismissed for serious misconduct but required to work until 9 August.

[12] I have not needed to resolve the conflict between the accounts of Mr Zhang and Mr Hang because Mr Hang's own evidence of the rudimentary disciplinary measures taken showed the dismissal was not what a fair and reasonable employer could have done, when measured against the test of justification at s103A of the Act.

[13] If Mr Hang did give Mr Zhang the 19 July letter calling him to a disciplinary meeting (which Mr Zhang said he did not), the letter did not tell him enough about the concerns to which he was to respond. It stated – as spelt in the original – that “*the area of concern is your serious and repeate failure to follow instrucation and Non performance of duties as a experience chinese chef*”. Even if that were enough to put Mr Zhang on notice of the problem, Mr Hang confirmed he knew Mr Zhang could not read English.

[14] The concerns raised were clearly what a fair and reasonable employer, in all the particular circumstances, could only consider were matters of performance. Those circumstances included the fact that Mr Zhang was new to the restaurant and to the New Zealand produce he was preparing (under the direction of a head chef) and that the volume of demand in the recently re-opened restaurant was not entirely predictable. There was no evidence that what Mr Zhang did in his kitchen work, either on one night or on an ongoing basis, caused such grave problems or was so irremediable that his performance amounted to serious misconduct.

[15] Mr Hang's action in dismissing Mr Zhang on 21 July for concerns allegedly raised with him only on 19 July clearly fell short when measured against the non-

exhaustive list of questions suggested by the Employment Court for assessing the fairness of how an employer has addressed performance concerns:¹

- (1) Did the employer in fact become dissatisfied with the employee's performance of his or her duties?*
- (2) If so, did the employer inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance?*
- (3) Was the information given to the employee readily comprehensible in the sense of being an objective criticism of the work so far and an objective statement of standards requiring to be met?*
- (4) Was a reasonable time allowed for the attainment of those standards?*
- (5) Following the expiry of such a reasonable time and following reasonable information of what was required of the employee, did the employer turn its mind fairly to the question whether the employee had achieved or substantially achieved what was expected, including:*
 - (a) Using an objective assessment of measurable targets;*
 - (b) Fairly placing the tentative conclusions before the employee with an opportunity to explain or refute those conclusions;*
 - (c) Listening to the employee's explanation with an open mind;*
 - (d) Considering the employee's explanation and all favourable aspects of the employee's service record and the employer's responsibility for the situation that had developed (for example, by not detecting weaknesses sooner or by promoting the employee beyond the level of his or her competence); and*
 - (e) Exhausting all possible remedial steps including training, counselling, and the exploration of redeployment.*

[16] Having identified an apparent problem in some aspects of Mr Zhang's work, Mr Hang (who emphasised in his evidence that he was not qualified or experienced as a Chinese chef) should have, in consultation with the restaurant's head chef, set some objective standards to measure Mr Zhang's performance and given him some reasonable time to meet those standards before taking any further disciplinary action. He had not exhausted possible remedial steps before making the decision to dismiss Mr Zhang.

[17] It was also significant that having supposedly made the decision on 21 July that Mr Zhang was not a suitable chef, Mr Hang required him to keep working until 9 August. He said that was a matter of kindness but it also indicated that he did not see Mr Zhang's conduct as so serious that it warranted immediate dismissal. Rather Mr Hang had enough trust in Mr Zhang's ongoing ability to perform his duties satisfactorily that he required him to work in the kitchen for a further 16 days, undermining the likelihood that Mr Hang's confidence was actually deeply impaired or destroyed to the extent that would justify a dismissal for serious misconduct.²

¹ *Trotter v Telecom NZ Limited* [1993] 2 ERNZ 659, 681.

² *Northern Distribution Union v BP Oil NZ Limited* [1992] 3ERNZ 483 (CA) at 487.

[18] Another reason offered by Mr Hang to justify Mr Zhang's dismissal was that he had found out, from talking to Mr Zhang in July 2013, that Mr Zhang had misrepresented his experience as a Chinese chef because his previous work included four years working in a Japanese restaurant in Singapore. However Mr Hang knew, or should have known, about that work before he decided in October 2012 to offer Mr Zhang a job. Mr Hang provided a copy of Mr Zhang's curriculum vitae to the Authority investigation. He said his agent sent him Mr Zhang's CV before he authorised the agent to conduct an interview of Mr Zhang and before the job offer was made. The CV clearly showed the dates and places where Mr Zhang had worked, including the time at a Japanese restaurant in Singapore. If that was unacceptable experience in Mr Hang's view, he was aware of it before he authorised the job offer and could not, fairly, use it as part of the reason to later dismiss Mr Zhang.

[19] I did not accept an unauthenticated document Mr Hang sought to have admitted in evidence at the investigation meeting that he said showed Mr Zhang's experience from his work in the restaurant of a Chinese hotel was more limited than Mr Hang expected. That too was a matter Mr Hang could have more thoroughly explored before he arranged for Mr Zhang to be offered the position. Mr Zhang's own evidence included original documents showing he had intermediate and senior level occupational qualifications as a chef gained through training in China. I had no reason not to accept those documents were genuine.

[20] Mr Hang also submitted that what he did in dealing with Mr Zhang was reasonable in the context of a small family business. He said he had some training in human resources matters while working in a previous role in a New Zealand fast food chain, believed he understood what was required for a fair disciplinary process, and had prepared letters for Mr Zhang using templates he had got in that previous role. While I considered the limited resources available to the company in dealing with its concerns about Mr Zhang, I concluded it had not given him a reasonable opportunity to respond to those concerns (by considering what additional training or supervision could reasonably have been provided and allowing reasonable time to meet clearly set-out standards) before taking the decision to dismiss him.³ The defects in how the company handled the matter were not minor and resulted in Mr Zhang being unfairly

³ Section 103A(3)(a) and (c) of the Act.

denied the opportunity to improve or show he could meet expected standards.⁴ There was no evidence that supported a conclusion that if Mr Hang had provided those opportunities for correction and improvement, Mr Zhang would nevertheless have failed to meet expected standards and have been dismissed in any event at a later date.

Should any remedies be awarded?

Lost wages

[21] For his personal grievance of unjustified dismissal Mr Zhang sought an order of three weeks' lost wages. He secured and started a new job at another Chinese restaurant from 1 September 2013. He also had the terms of his work visa changed to allow him to work for his new employer.

[22] The relatively short period between ending work for Fuchunjiang Limited and starting a new job demonstrated he made reasonable endeavours to mitigate his losses incurred as a result of his grievance.

[23] But for his unjustified dismissal Mr Zhang would have been paid at least \$1800 by Fuchunjiang Limited in that three week period. That is the amount the company must pay Mr Zhang to reimburse him for lost remuneration under s123(1)(b) and s128 of the Act.

Compensation for hurt and humiliation

[24] I have accepted Mr Zhang's evidence that he was humiliated by how Fuchunjiang Limited ended his employment and his submission that his distress was heightened by an additional sense of vulnerability due to his migrant status. In the days following the dismissal he said he had "*very heavy feelings*" because he had only recently arrived in New Zealand and had no friends or family around to help him. He had sleepless nights, swollen eyes and missed meals.

[25] His evidence that his wife in China was also upset at the news of his dismissal was not relevant to the award or level of compensation for his humiliation, loss of dignity and injury to his feelings.⁵

⁴ Section 103A(5) of the Act.

⁵ *Air New Zealand Ltd v Johnston* [1992] 1 ERNZ 700 (CA) at 707 and 170 and *Arundell v Flexicon Plastics Ltd* (unreported, EC, AEC67/97, 27 June 1997) at 15.

[26] In light of the relatively short period before he was ‘back on his feet’ in a new job, no evidence of any on-going effects on him, and the context of other amounts awarded to him by this determination, I considered \$3000 was the appropriate and very modest level at which to set compensation under s123(1)(c)(i) of the Act.

Did any behaviour of Mr Zhang warrant a reduction of those remedies?

[27] As required by s124 of the Act I considered whether any remedies awarded to Mr Zhang should be reduced due to any actions by him that contributed to the situation giving rise to his grievance. He accepted he had run short of sliced meat and made a mistake about which meat to prepare on the one day referred to by Mr Hang. However I was not satisfied the available evidence established Mr Zhang’s conduct on that occasion was so blameworthy that a reduction of remedies was required. To reach a different conclusion more would have been needed about the extent to which he had been properly instructed and how the meat mix up had occurred.

Was Mr Zhang owed any arrears of wages?

Pay from the date of his arrival

[28] The employment agreement Mr Zhang signed in October 2012 included the following term:

The employment is valid for two years and commence (sic) from the day of arrival in NZ by the employee with the work visa issued by INZ.

[29] The underlined emphasis is mine and the reference to INZ is to Immigration New Zealand. The agreement also provided for an “*annual salary*” of NZ\$31,200 before tax. Once Mr Zhang started working he was paid \$1200 a fortnight, which is the amount reached by dividing the annual salary by 26.

[30] Mr Hang’s evidence was that he had initially pushed for INZ to allow Mr Zhang to come quickly after October 2012 as he assumed the restaurant would open before Christmas that year. However delays caused by his building contractor and Council requirements meant repairs did not happen as soon as he had hoped. Mr Hang said he sent a message through his agent advising Mr Zhang to delay his departure from China. Mr Hang also had some evidence of an internet message exchange between his New Zealand immigration advisor and their agent in Shanghai

that referred to difficulty getting in touch with Mr Zhang and which included a comment saying “*let him come*” but to tell him to bring more money.

[31] I was not satisfied Mr Hang’s evidence established Mr Zhang was ever actually advised to delay his departure from China or that there might not be work for him at the restaurant as soon as he arrived in New Zealand. Instead it was clear Mr Zhang did arrive on 23 April 2013 and at that date met the requirements of the terms of his employment agreement for commencing work. He was ready and willing to work. His passport showed he had the necessary work visa from INZ to work as a chef for Fuchunjiang Limited in Auckland. He was entitled to be paid from that date.

[32] Mr Hang’s evidence was that he sought approval from the company’s insurer to have Mr Zhang paid under the terms of a business interruption policy that was activated due to damage and closure of the restaurant following the fire in June 2012. Wages for at least one other chef (who was employed at the time of the fire) were paid under the policy but Mr Hang said the insurer’s loss adjustor advised the policy would not cover Mr Zhang’s pay as he had not yet got his IRD number (at that time).

[33] However insurance policy coverage and whether Mr Zhang had an IRD number were irrelevant to the company’s obligation to pay him from when his employment commenced (which under the terms of his agreement was the day of arrival with a valid visa). Even if it were relevant, IRD would usually have issued a number within ten days.⁶

[34] Rather, as a matter of financial convenience for Fuchunjiang Limited, the company did not honour its agreement that Mr Zhang could commence employment from the day of his arrival, and consequently also breached its obligation to pay him from that date. Neither, according to Mr Hang’s evidence on this point, had it agreed to vary that agreement by paying Mr Zhang \$200 a week until the restaurant opened. Instead, I have found, the company remained obliged to pay him what he would otherwise have been paid in the interim, that is \$1200 a fortnight. For the period from 24 April to 8 July 2013 that amounted to five fortnightly pay periods (at \$1200 each) and a further six days (at \$100 per day, as Mr Hang said the pay was calculated on the basis of working six days a week). The result was that Mr Zhang was owed wages arrears of \$6600 for that period.

⁶ www.ird.govt.nz/how-to/irdnumbers

[35] It was irrelevant to the company's obligations for that period that Mr Zhang, as he admitted, worked some casual shifts at a fish shop for cash. Strictly speaking that was outside the terms of his work visa but it was a situation caused by his legal employer's breach of his employment agreement that left him without expected earnings to pay for rent and food. Mr Hang did lend Mr Zhang \$1000 during that period, but that was on an 'IOU' basis (for which Mr Zhang signed a receipt and later paid back to Mr Hang).

Not paid properly for all hours worked

[36] Mr Zhang also claimed wage arrears for hours he worked in excess of 40 hours a week in the period between 9 July and 9 August. He produced his own notes of hours, made on the days worked or soon after.

[37] Mr Hang denied Mr Zhang was entitled to payment for those hours. The terms of the employment agreement were for an annual salary with normal hours of work defined as a "*minimum*" of 40 hours a week and a requirement to "*perform such overtime as may reasonably be required by the employer*". He said no record of hours was kept for kitchen staff because they were all employed on this salaried basis. Mr Hang accepted he did not know Mr Zhang's actual hours of work. Mr Hang was at the restaurant most days but he usually arrived after opening time and left before closing. He said the head chef had authority to arrange start and finish times.

[38] In that context, and with one variation I have explained below, I have accepted Mr Zhang's evidence about the hours that he worked. However I have not accepted his claim that he was entitled to be paid at the rate of \$15 an hour for each hour that he worked in excess of 40 hours each week. At least some of such hours were covered by the term of his employment requiring him to perform a reasonable level of overtime (but the agreement provided no definition of that level or any arrangement for payment of hours worked in excess of it).

[39] Instead, on considering Mr Zhang's evidence of the hours worked, along with the evidence of what he was paid, I found he had received less than he was entitled to under the Minimum Wage Act 1983. I have made a wage arrears order to remedy that breach of his statutory rights.

[40] In calculating the arrears due I took account of an allegation by Mr Hang that the hours recorded by Mr Zhang each day must have included a 30-minute meal break and two other 15-minute breaks (but for which he was not entitled to be paid) or that Mr Zhang had included his travel time to and from the restaurant. Mr Zhang insisted neither factor was included in his account of hours. To give Mr Hang some benefit of the doubt, and to allow for a margin of error, I have subtracted 30 minutes a day from the calculation of hours.

[41] Mr Zhang received two payments of \$1200 and a final payment of \$276 for his work from 9 July to 9 August. Those figures are gross value, not net pay. He had three days off in that period. His record of hours worked totalled 302.5. From that total I deducted 30 minutes a day (totalling 14.5 hours over the 29 days worked) to allow a margin for the disputed breaks. That calculation gave a total of 288 hours for which he was paid the gross equivalent of \$2676. On an hourly basis that amounted to \$9.29, well below the minimum wage rate of \$13.75 applicable at the time. The difference was \$1284.48 (being \$4.46 multiplied by 288 hours). That amount has been awarded as wage arrears due to him under s131 of the Act and ss 6 and 11 of the Minimum Wage Act 1983.

Not paid holiday pay on termination

[42] Mr Zhang was not paid holiday pay on the termination of his employment. The statement in reply lodged by Mr Hang said that was “*because the contract clearly states that the employee would only be entitled to annual leave after 12 months of continuous employment*”. That contention was plainly wrong and in breach of the requirement of s23(2) of the Holidays Act 2003.

[43] Fuchunjiang Limited was obliged to pay Mr Zhang eight per cent of his gross earnings as holiday pay. He had not taken any paid annual leave in advance. In light of this determination, Mr Zhang was owed holiday pay of \$844.80. That amount is eight per cent of the gross earnings of \$10,560 he should have received comprising:

- (a) \$6600 for the period from 24 April to 8 July 2013; and
- (b) \$3960 for the period from 9 July to 9 August.

Costs

[44] In the event that he was successful in his personal grievance application Mr Zhang sought an order for his costs of representation be made within the Authority's usual daily tariff range. Having been successful he is entitled to an award of costs on that basis, which I have set at \$3000. There was no information suggesting that tariff should be adjusted upwards or downwards when considered against the usual principles.⁷

[45] Fuchunjiang Limited must also pay Mr Zhang the further sum of \$71.56 in reimbursement of the Authority filing fee.

Robin Arthur
Member of the Employment Relations Authority

⁷ Clause 15(1) of Schedule 2 of the Act and *PBO Limited v Da Cruz* [2005] 1 ERNZ 808.